STATE OF MICHIGAN

IN THE SUPREME COURT

JACQUELYN V. MAGEE,

Plaintiff-Appellee

v

DAIMLERCHRYSLER,

Defendant-Appellant

Supreme Court Case No. _____

Court of Appeals Docket No. 243847

Macomb County Circuit Case
No.: 02-538-CZ

J. Biernat

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NOTICE OF HEARING

DEFENDANT-APPELLANT'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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FILED

MAY 25 2004

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DEFENDANT-APPELLANT'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

Defendant DaimlerChrysler Corporation ("DaimlerChrysler"), through its undersigned attorneys, states as follows in support of its Emergency Application for Leave to Appeal, brought pursuant to MCR 7.302:

1. Plaintiff-Appellee brought this action alleging various acts of discrimination and harassment in violation of the Elliot-Larsen Civil Rights Act, MCL § 37.2101 *et seq.* (Exhibit F, Amended Complaint ¶ 3).

2. MCL § 600.5805(9) provides that claims brought under the Elliot-Larsen Civil Rights Act are subject to a three (3) year Statute of Limitations.

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3. Plaintiff-Appellee Jacquelyn V. Magee ("Plaintiff") began her employment with Defendant on or about July 16, 1976. (Exhibit F, Amended Complaint ¶ 6).

4. Plaintiff-Appellee's last day of work was September 12, 1998, when she began a medical leave of absence. (Exhibit F, Amended Complaint ¶ 14).

5. Without ever returning to work, Plaintiff-Appellee officially resigned her employment on February 2, 1999, when she applied for and received a disability retirement. (Exhibit F, Amended Complaint ¶ 21).

6. Plaintiff-Appellee did not file this lawsuit until February 1, 2002. In her suit, Plaintiff alleges that DaimlerChrysler subjected her to sexual harassment, gender and age discrimination, retaliation and constructive discharge, all of which are based on incidents which occurred prior to her last day of work on September 12, 1998. (Exhibit E, Complaint; Exhibit F, Amended Complaint; Exhibit G, Plaintiff's Answer to Renewed Motion for Summary Disposition, ¶ 5).

7. On June 24, 2002, in response to DaimlerChrysler filing a Motion for Summary Disposition based on Plaintiff-Appellee's claims being barred by the applicable statute of limitations, the Trial Court allowed Plaintiff-Appellee to amend her Complaint to specifically allege events which occurred within the Statute of Limitations, *i.e.*, between her last day of work, September 12, 1998, and her resignation on February 2, 1999. (Exhibit J, 6/24/02 Order).

8. Plaintiff-Appellee filed her Amended Complaint, but failed to allege any event which occurred within the Statute of Limitations. (Exhibit F, Amended Complaint).

9. Plaintiff-Appellee admitted that the events that give rise to her sexual harassment, gender and age discrimination, retaliation and constructive discharge claims

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occurred *prior* to September 12, 1998. (Exhibit G, Plaintiff's Answer to Renewed Motion for Summary Disposition, ¶ 5).

10. Plaintiff-Appellee's claims for sexual harassment, gender and age discrimination, retaliation and constructive discharge are barred by the Statute of Limitations.

11. Constructive discharge is not recognized as a separate cause of action. Instead, it is merely a defense to an employer's allegation that an employee left employment voluntarily.

12. Plaintiff cannot show that a constructive discharge occurred.

13. The "employment actions" which form the basis for Plaintiff-Appellee's suit and claims occurred no later than September 12, 1998, the last day she was in the workplace, and therefore fall outside the three year Statute of Limitations. Accordingly, summary disposition is warranted in this case because Plaintiff-Appellee failed to file her lawsuit within the three year Statute of Limitations.

14. The Trial Court granted summary disposition pursuant to MCR 2.116(C)(7) because Plaintiff-Appellee's claims are untimely. (Exhibit A, 8/26/02 Order).

15. On March 2, 2004, the Court of Appeals agreed with the Trial Court that Plaintiff-Appellee could not assert a constructive discharge claim and further noted that Plaintiff-Appellee was never discharged. Nevertheless, the Court of Appeals reversed the Trial Court and found Plaintiff-Appellee's claims timely under Collins v Comerica Bank, 468 Mich 628; 644 NW2d 713 (2003), on the basis that Plaintiff-Appellee was still employed by Defendant-Appellant during the Statute of Limitations, although she was not in the workplace. (Exhibit B, 3/2/04 Order).

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16. Defendant-Appellant filed a Motion for Reconsideration with the Court of Appeals pointing out that Collins was not germane to the issue of whether Plaintiff-Appellee's claims are timely because, unlike Collins, this is not a discharge case. The Court of Appeals summarily denied Defendant-Appellant's Motion on April 19, 2004. (Exhibit C, 4/19/04 Order).

17. The Court of Appeals erroneously relied on Collins to reverse summary disposition based on the Statute of Limitations. Plaintiff-Appellee's last day in the workplace was September 12, 1998. Plaintiff-Appellee did not have any contact with the alleged harassers after that date and, by her own admission, her claims accrued prior to September 12, 1998. Thus, Plaintiff-Appellee's Complaint filed on February 1, 2002 was untimely.

WHEREFORE, Defendant-Appellant DaimlerChrysler Corporation respectfully requests that this Honorable Court: (1) grant its Emergency Application for Leave to Appeal; (2) enter an Order peremptorily reversing the Court of Appeals Orders dated March 2, 2004 and April 19, 2004, and (3) dismiss Plaintiff-Appellee's Complaint with prejudice.

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Dated: May 24, 2004

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BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

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Court Rules

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Pursuant to MCR 7.302(B)(5), Defendant-Appellant DaimlerChrysler Corporation seeks leave to appeal the Court of Appeals' reversal of the Trial Court's granting of summary disposition and denial of rehearing after the Court of Appeals erroneously applied Collins and allowed Plaintiff-Appellee's claims which accrued outside the statute of limitations to survive. Material injustice will result if Defendant-Appellant is forced to defend these time barred claims.

Specifically, on August 26, 2002, the Trial Court granted Defendant-Appellant DaimlerChrysler Corporation summary disposition on all of Plaintiff-Appellee Jacquelyn Magee's claims because they are barred by the applicable three (3) year statute of limitations. (Exhibit A, 8/26/02 Order). Plaintiff-Appellee appealed this decision and on March 2, 2004, without the benefit of oral argument, the Michigan Court of Appeals reversed the Trial Court. (Exhibit B, 3/2/04 Order, at 2). In reversing the Trial Court's grant of summary disposition, the Court of Appeals affirmed the Trial Court's finding that a constructive discharge claim was not a viable cause of action and also acknowledged that Plaintiff-Appellee was not discharged. (Exhibit B, 3/2/04 Order, at 2). Nevertheless, the Court of Appeals found that Plaintiff-Appellee's suit was timely because she was still employed by Defendant within the Statute of Limitations even though she had not been in the workplace for over three years prior to filing her Complaint and was not alleging anything had occurred within the Statute of Limitations. When doing so, the Court of Appeals relied on Collins v Comerica Bank, 468 Mich 628; 664 NW2d 713 (2003) a decision issued after this matter was fully briefed and which is not dispositive here. (Exhibit B, 3/2/04 Order, at 2).

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On March 18, 2004, Defendant-Appellant DaimlerChrysler Corporation filed a Motion for Reconsideration. While Plaintiff-Appellee Jacquelyn Magee failed to answer the Motion, the Court of Appeals summarily denied Defendant-Appellant's Motion for Reconsideration on April 19, 2004. (Exhibit C, 4/19/04 Order).

The Court of Appeals' conclusion that a constructive discharge claim is not viable, that Plaintiff-Appellee was not discharged and that her last day in the workplace was over three years prior to her filing her Complaint does not comport with its conclusion that Plaintiff-Appellee's claims were timely. This decision is clearly erroneous and will cause material injustice if Defendant-Appellant is required to defend these time-barred claims.

Defendant-Appellant respectfully requests that this Court grant its Emergency Application for Leave to Appeal, or in the alternative, to peremptorily reverse the Court of Appeals March 2, 2004 and April 19, 2004 Orders.

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the Trial Court correctly concluded that Plaintiff-Appellee's claims are barred by the Statute of Limitations when Plaintiff-Appellee's last day in the workplace was September 12, 1998 and she did not file this lawsuit until more than three (3) years later on February 1, 2002?

Defendant/Appellant DaimlerChrysler Corporation answers:	"Yes"
Plaintiff-Appellee Jacquelyn Magee would answer:	"No"
Michigan Court of Appeals answered:	"No"
Macomb County Circuit Court answered:	"Yes"

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STATEMENT OF FACTS

Plaintiff-Appellee Jacquelyn V. Magee ("Magee") brought this action under the Elliott-Larson Civil Rights Act, MCL § 37.2111 *et seq.*, alleging that Defendant-Appellant DaimlerChrysler Corporation ("DaimlerChrysler") unlawfully discriminated against her, harassed her based on her sex and age, and retaliated against her while she was working as a hourly UAW production employee at DaimlerChrysler. (Exhibit D, Complaint ¶ 3). These claims include transfer claims from 1992 and 1994, along with a variety of harassment allegations dating back to the 1980s when Plaintiff-Appellee was working in DaimlerChrysler's various facilities. (Exhibit E, Amended Complaint ¶¶ 8-12).

Magee's last day in the workplace was September 12, 1998. (Exhibit E, Amended Complaint ¶ 14). Plaintiff-Appellee ***admitted*** that all of the events giving rise to her claims of sexual harassment, hostile work environment, retaliation and constructive discharge occurred ***before*** September 12, 1998. (Exhibit F, Plaintiff's Answer to Defendant's Renewed Motion for Summary Disposition, ¶ 6; Exhibit G, 8/26/02 Hearing Transcript, 7-8). Magee did not return to work after September 12, 1998, nor did she have any contact with the alleged harassers after that date. (Exhibit E, Amended Complaint, ¶¶ 14-16; Exhibit H, Plaintiff's Answer to Defendant's Motion for Summary Disposition, ¶5; Exhibit G, 8/26/02 Hearing Transcript, at 7-8). Instead, Magee simply resigned five months later on February 2, 1999. (Exhibit E, Amended Complaint ¶¶ 15, 21).

Magee waited until February 1, 2002, three and a half years after her last day in the workplace, September 12, 1998, to file the instant action. (Exhibit D, Complaint). In response to Magee's Complaint, DaimlerChrysler filed a Motion for Summary Disposition which was denied without prejudice to allow Magee to amend her Complaint to "specifically allege

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continuous harassment and/or retaliation up through her resignation on February 2, 1999." (*See* Exhibit I, 6/24/02 Order at 2). In other words, the Trial Court gave Magee an opportunity to allege that she was subjected to harassment and/or discrimination ***after*** she left the workplace on September 12, 1998 ***and*** within the Statute of Limitations. (Exhibit I, 6/24/02 Order at 2). Magee filed an Amended Complaint on July 8, 2002, but failed to heed the Trial Court's suggestion. (Exhibit E, Amended Complaint). This was not surprising to DaimlerChrysler as absolutely nothing occurred between Magee's last day of work on September 12, 1998 and her resignation on February 2, 1999 that is actionable. As a result, DaimlerChrysler filed a Renewed Motion for Summary Disposition based upon the Statute of Limitations. After the matter was fully briefed and the Trial Court heard argument, DaimlerChrysler's Motion was granted and Magee's Amended Complaint was dismissed. (Exhibit A, 8/26/02 Order).

Magee appealed and, without oral argument, the Court of Appeals determined that:

> **The trial court correctly dismissed plaintiff's claim of constructive discharge.** Constructive discharge is not itself a cause of action, but rather is a defense against the argument that a suit should not lie in a specific case because the plaintiff left employment voluntarily. **An employee who resigns in apprehension that conditions will deteriorate at a later time is not constructively discharged.**
>
> We reverse that portion of the trial court's order dismissing plaintiff's remaining claims pursuant to MCR 2.116(C)(7). In Collins v Comerica Bank, 468 Mich 628, 633-634; 664 NW2d 713 (2003), our Supreme Court held that a claim for discriminatory discharge does not arise until the employee is discharged. **Plaintiff was not discharged**; however, her last day of work was followed by a period in which she was on a medical leave of absence. During that period, she was still employed by defendant. Plaintiff's causes of action, if any arose on February 2, 1999. Her suit, which was originally filed on February 1, 2002, was timely.

(Exhibit B, March 2, 2004 Opinion)(internal citations omitted)(emphasis added).

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DaimlerChrysler then filed a Motion for Reconsideration arguing that a palpable error occurred when the Court of Appeals relied on Collins v Comerica Bank, 468 Mich 628, 633-634; 664 NW 2d 713 (2003), because that case is inapplicable after the Court of Appeals determined that Magee was not discharged (constructively or otherwise). DaimlerChrysler further pointed out that Magee had admitted that her causes of action, if any, arose on or before her last day in the workplace, September 12, 1998, not on the date she resigned several months later. The fact that Magee remained employed is immaterial as Magee is not alleging anything happened to her after her last day in the workplace.

The Court of Appeals summarily denied DaimlerChrysler's Motion for Reconsideration. (Exhibit C, 4/19/04 Order). DaimlerChrysler now seeks leave to appeal as it is entitled to summary disposition on Magee's time barred claims. For purposes of this appeal, whether Magee was subjected to discrimination, retaliation or a hostile work environment is not at issue.[1] The only issue on appeal is whether such allegations are barred by the applicable Statute of Limitations.

ARGUMENT

THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFF-APPELLEE'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS WHEN PLAINTIFF-APPELLEE'S LAST DAY IN THE WORKPLACE WAS SEPTEMBER 12, 1998 AND SHE DID NOT FILE THIS LAWSUIT UNTIL FEBRUARY 1, 2002.

A. Standard of Review

Whether a cause of action is barred by a statute of limitations is a question of law, which the Supreme Court reviews *de novo*. Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 62; 642 NW2d 663 (2002). Similarly, the Supreme Court reviews *de*

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[1] DaimlerChrysler does not waive its right to challenge these allegations on the merits.

novo decisions on summary disposition motions. First Public Corp v Parfet, 468 Mich 101, 104; 658 NW2d 477 (2003).

B. Analysis

The Court of Appeals' finding that Magee's claims are timely is clearly erroneous and will cause material injustice if DaimlerChrysler is forced to defend these time-barred claims. A claim accrues when a Plaintiff can allege each element of the claim. Here, **Magee's claims of sexual harassment, hostile work environment and retaliation undisputedly accrued on or before her last day in the workplace, *i.e.*, September 12, 1998**, because she does not claim that she was sexually harassed, subjected to a hostile work environment or retaliated against while she was out of the workplace. Magee's last day of work at DaimlerChrysler was September 12, 1998. She did not bring this lawsuit until February 1, 2002, over three years later. As such, Magee cannot possibly assert a timely claim for sexual harassment, hostile work environment and retaliation. This is especially true given that the Court of Appeals correctly found that Magee was not discharged, constructively or otherwise.

1. Collins is Only Applicable to Determining when a Discharge Claim Accrues And Magee Does Not Assert a Discharge Claim

Without the benefit of oral argument, the Court of Appeals relied on Collins v Comerica Bank, 468 Mich 628; 664 NW2d 713 (2003), a decision issued after the issues in this matter were fully briefed, to reverse the Trial Court's granting of summary disposition.[2] Collins is inapplicable here. In Collins, the plaintiff was suspended on September 5, 1996 for failing to cooperate with her employer's internal investigation. On September 25, 1996, the plaintiff in Collins was terminated. On September 24, 1999, she filed a complaint alleging

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[2] Magee filed her Reply Brief on appeal on June 10, 2003. The Supreme Court issued the Collins decision on July 2, 2003.

that her termination was the product of race and gender discrimination. The employer moved for summary disposition based on the applicable Statute of Limitations. The Supreme Court reversed the Court of Appeals and determined that a claim of discriminatory discharge cannot arise until a claimant has, in fact, been discharged. Collins, 468 Mich at 633.

Here, the Court of Appeals determined Magee was not discharged, nor was she constructively discharged. (*See* Exhibit B, 3/2/04 Opinion, at 2). **Thus, Magee does not have a discriminatory discharge claim.** Since Magee does not and cannot assert a discharge claim, the date she resigned her employment is irrelevant to determining whether she can assert a timely harassment claim. Indeed, that date is only relevant to determining when a discharge claim could have accrued.[3] *See, e.g.,* Collins, 468 Mich at 634 n.3 (noting that a discriminatory discharge and discriminatory suspension claim may have different accrual dates). As such, the Supreme Court's holding in Collins that a discharge claim does not accrue until an employee is discharged is inapplicable to this case and is not dispositive as to whether Magee's claims were timely.

2. Magee's Claims Accrued on or Before September 12, 1998

Absent a discharge claim, Magee is left with her claims of discrimination, harassment and retaliation. The purpose of the Statute of Limitations is to protect defendants against stale or fraudulent claims. *See* Larson v Johns-Manville Sales Corp, 427 Mich 301, 310; 339 NW2d (1986). Contrary to the Court of Appeals conclusion, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for

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[3] Moreover, these facts are clearly distinguishable from Collins. In Collins, the employer initially suspended the employee and later decided to terminate the employee. Here, it was Magee who decided to take a medical leave, and it was her decision to later resign her employment. Magee has not alleged any decision by DaimlerChrysler after September 12, 1998, which affected her employment. Instead, it was her decision to resign her employment rather than return to work.

employment discrimination." Delaware State College v Ricks 449 US 250, 257; 101 S Ct 498; 66 L Ed 2d 431 (1980).

Instead, to determine whether any of Magee's claims are timely, the Court must look to the date on which the alleged discriminatory acts occurred. "A claim accrues when all the necessary elements have occurred and can be alleged in a proper complaint." Mascarenas v Union Carbide Corp, 196 Mich App 240, 244; 492 NW2d 512 (1992); McNamus v General Motors Corp, No. 182217, 1997 Mich App Lexis 2894, at *3 (1997) (a cause of action accrues on the date when plaintiff can allege each element of the asserted claim)(unpublished)(attached as Exhibit J); *see also*, National Railroad Passenger Corp v Morgan, 536 US 101; 122 S Ct 2061, 2073; 153 L Ed 106 (2002) (discrete acts such as termination, failure to promote, denial of transfer, and failure to train that fall outside of the statute of limitations are barred and cannot be resurrected by the continuing violations theory); Kaiser v Utica Community Sch, No. 219132, 2001 Mich App Lexis 1876, at *7-9 (Nov. 20, 2001) (failure to receive positions for which plaintiffs were qualified gave rise to the level of permanence that should have alerted them to assert their rights)(unpublished)(attached as Exhibit K).

Magee's last day of work with DaimlerChrysler was September 12, 1998. While Magee was still technically employed by DaimlerChrysler for five more months, it is undisputed that she did not have any contact with the alleged harassers after September 12, 1998. Further, Magee does not allege that any incidents occurred after that date which precipitated her resignation even though the Trial Court gave her the opportunity to do so. Magee admitted that her hostile work environment, retaliation and constructive discharge claims are all based on incidents which occurred ***prior*** to September 12, 1998. *See, e.g.*,

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Exhibit F, Plaintiff's Answer to Defendant's Renewed Motion for Summary Disposition, ¶ 6; Exhibit G, 8/26/02 Transcript at 7-8.

Stated simply, all of the elements necessary for Magee's claims occurred prior to September 12, 1998 and her claims accrued no later than that date. September 12, 1998 is clearly outside the Statute of Limitations, and Magee's claims are barred. To find otherwise would nullify the Statute of Limitations as all claims would be timely so long as an employee remained employed during the Statute of Limitations regardless of when the alleged discrimination/harassment occurred. *See, e.g.*, Ricks, *supra*, Johnson v Department of Corrections, 2004 Mich App Lexis 276, at *6-7 (January 27, 2004)(attached as Exhibit L)(sexual harassment claims that accrued more than three years prior to plaintiff's filing of her complaint were barred by the statute of limitations even though plaintiff was employed during the statute of limitations), Mitchell v Per Se Technologies, Inc, No. 02-6264, 2003 US App Lexis 9364, at *4 (CA6 2003)(attached as Exhibit M) (hostile environment claim barred by the Statute of Limitations when the Plaintiff failed to file charge of discrimination following the last act that could be construed as sexual harassment).

Even if Magee could somehow allege a timely act of discrimination, the Court of Appeals failed to even address the fact that anything that occurred more than three years before she filed suit is barred by the Statute of Limitations. By way of example, Magee alleges transfer claims that occurred in 1992 and 1994, several years outside of the Statute of Limitations. In National Railroad Passenger Corp v Morgan, 536 US 101; 122 S Ct 2061, 2073; 153 L Ed 106 (2002) the Supreme Court held that discrete acts, such as termination, failure to promote, **denial of transfer**, and failure to train, that fall outside of the statute of limitations are barred and cannot be resurrected by the continuing violations theory. Such

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Mich App 482, 486-87; 339 NW2d 223 (1983), Jacobson v Parda Federal Credit Union, 457 Mich 318; 577 NW2d 881 (1998).

i. No Reasonable Person Would Have Felt Compelled to Resign on February 2, 1999

Here, no timely underlying action exists to support any potential constructive discharge claim as Magee had removed herself from the alleged discriminatory work environment five months prior to her decision to retire, on September 12, 1998. "[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." Jacobson, 457 Mich at 325-326 (quoting Champion v Nationwide Security, Inc, 450 Mich 702; 545 NW2d 596 (1996)). In Agnew v BASF, Corp, 286 F3d 307 (CA6 2002), the plaintiff was placed on a performance improvement plan on November 11, 1997. Two days later, plaintiff took a leave of absence due to emotional stress. Plaintiff returned to work on March 26, 1998, was placed on a new performance improvement plan, and then resigned the same day. Plaintiff argued that he was constructively discharged. The Sixth Circuit disagreed, stating:

> An employee who quits a job in apprehension that conditions may deteriorate later is not constructively discharged. Instead, the employee is obliged "not to assume the worst, and not to jump to conclusions to fast. [Plaintiff's] resignation was premature, and therefore he cannot make a submissible case of constructive discharge in order to establish a prima facie case of discrimination.

Agnew, 286 F3d at 310-311 (internal citations omitted). In other words, an employee cannot establish constructive discharge by assuming that something bad is going to happen – something must actually occur.

Moreover, in Johnson v United Parcel Service, No. 3:99-CV-481-H, 2000 US Dist Lexis 21666 (WD Ky Nov. 6, 2000)(attached as Exhibit N), a case with allegations similar to

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those presented in this action, the plaintiff was transferred to a department where the environment was sexually charged and she was allegedly singled out for disciplinary actions. Plaintiff complained on two occasions, December 1997 and February 1998. In February 1998, plaintiff began a medical leave, and on August 1998, ***without*** returning to work, she resigned. The court held that plaintiff's claim of constructive discharge failed because she did not return to work after her leave of absence to determine whether the conditions had changed.

Similar to the plaintiffs in Agnew and Johnson, Magee retired after her five month leave of absence because she ***assumed*** that the worst would happen if she returned to the workplace without even inquiring whether the alleged harassment/discrimination would continue. (*See, e.g.*, Exhibit E, Amended Complaint ¶ 16, 17). The courts are clear that constructive discharge claims cannot accrue from such assumptions. Given that a reasonable person would not have felt compelled to resign after being absent from the alleged discriminatory environment for over five months, Magee's retirement was premature and she cannot show that her decision to retire on February 2, 1999, was compelled by the intolerable working conditions requisite to establishing a constructive discharge.[4]

ii. Any Viable Constructive Discharge Claim Accrued Outside the Statute of Limitation and Magee Failed to Resign Her Employment at that Time

Magee seems to argue that a constructive discharge claim exists because the work environment that existed prior to her five month absence "forced" her to resign. However, such a claim only becomes evident when an employee resigns her employment. Magee failed

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[4] This argument is bolstered if Magee did not retire until February 2000 as stated in her Affidavit filed with her Appellate Brief. (Exhibit O, Magee Affidavit ¶¶ 11, 22). If that were true, Magee would have been absent from the alleged intolerable working conditions for almost a year and a half before making the decision to retire.

to resign when the alleged harassment occurred precluding a constructive discharge claim. Jacobson, 457 Mich at 327; Chambers v Trettco, Inc, 463 Mich 297, 317; 614 NW2d 910 (2000). For example, in Chambers, the plaintiff was sexually harassed by her supervisor, but did not leave her employment. Instead, she complained to her supervisor and worked for approximately three more months. Plaintiff was then discharged, allegedly for reasons unrelated to the harassment. The court held that **no constructive discharge occurred because the plaintiff failed to resign her employment *when* the harassment occurred.** Chambers, 463 Mich at 317.

Accordingly, just as the plaintiff in Chambers could not establish a constructive discharge claim when the plaintiff remained employed for three months following the alleged harassment, Magee cannot show that her decision to retire was based on actionable harassment when she did not have any contact with the alleged harassers for at least five months preceding that decision. Chambers, 463 Mich at 317, 322, n.8. Stated simply, for a potentially viable constructive discharge claim, Magee would have had to resign her employment when the alleged harassment occurred; *i.e.,* on September 12, 1998, a date outside of the Statute of Limitations. Magee failed to do so and thus any constructive discharge claim fails as a matter of law, a finding that the Court of Appeals agreed with in holding the "trial court correctly dismissed plaintiff's claim of constructive discharge."

RELIEF

Defendant-Appellant respectfully states that the Court of Appeals decision relying on Collins is clearly erroneous and a material injustice will occur if Defendant-Appellant is forced to defend these stale claims. Collins is not dispositive of the issues in this case. Collins addressed when a discriminatory discharge claim accrues, and the Court of Appeals

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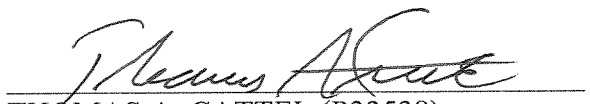
correctly held that Magee does not have a discharge claim. Because all of Magee's claims accrued at the latest on September 12, 1998, the last day she actually worked for DaimlerChrysler, those claims are time-barred and dismissal of those claims was warranted.

Accordingly, Defendant-Appellant DaimlerChrysler respectfully requests that this Honorable Court grant its Application for Leave to Appeal, or in the alternative, reverse the Court of Appeals and affirm the Trial Court's granting of summary disposition, and award Defendant-Appellant such other relief as the Court deems just and equitable.

CATTEL, TUYN & RUDZEWICZ, PLLC



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Dated: May 24, 2004

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STATE OF MICHIGAN

IN THE SUPREME COURT

JACQUELYN V. MAGEE,	Supreme Court Case No. _____
Plaintiff-Appellee	Court of Appeals Docket No. 243847
v	Macomb County Circuit Case No.: 02-538-CZ
DAIMLERCHRYSLER,	
Defendant-Appellant	

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DEFENDANT-APPELLANT'S DAIMLERCHRYSLER CORPORATION'S MOTION FOR IMMEDIATE CONSIDERATION

Defendant-Appellant DaimlerChrysler Corporation ("DaimlerChrysler"), through its undersigned attorneys, states as follows in support of its Motion for Immediate Consideration, brought pursuant to MCR 7.302(F):

1. Plaintiff-Appellee brought this action alleging various acts of discrimination and harassment in violation of the Elliot-Larsen Civil Rights Act, MCL § 37.2101 *et seq.* (Exhibit F, Amended Complaint ¶ 3).[1]

2. MCL § 600.5805(9) provides that claims brought under the Elliot-Larsen Civil Rights Act are subject to a three (3) year Statute of Limitations.

[1] All exhibits in this Motion refer to the Exhibits filed with Defendant-Appellant's Emergency Application for Leave to Appeal.

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3. Plaintiff-Appellee Jacquelyn V. Magee ("Plaintiff") began her employment with Defendant on or about July 16, 1976. (Exhibit F, Amended Complaint ¶ 6).

4. Plaintiff-Appellee's last day of work was September 12, 1998, when she began a medical leave of absence. (Exhibit F, Amended Complaint ¶ 14).

5. Without ever returning to work, Plaintiff-Appellee officially resigned her employment on February 2, 1999, when she applied for and received a disability retirement. (Exhibit F, Amended Complaint ¶ 21).

6. Plaintiff-Appellee did not file this lawsuit until February 1, 2002. In her suit, Plaintiff alleges that DaimlerChrysler subjected her to sexual harassment, gender and age discrimination, retaliation and constructive discharge, all of which are based on incidents which occurred prior to her last day of work on September 12, 1998. (Exhibit E, Complaint; Exhibit F, Amended Complaint; Exhibit G, Plaintiff's Answer to Renewed Motion for Summary Disposition, ¶ 5).

7. On June 24, 2002, in response to DaimlerChrysler filing a Motion for Summary Disposition based on Plaintiff-Appellee's claims being barred by the applicable statute of limitations, the Trial Court allowed Plaintiff-Appellee to amend her Complaint to specifically allege events which occurred within the Statute of Limitations, *i.e.*, between her last day of work, September 12, 1998, and her resignation on February 2, 1999. (Exhibit J, 6/24/02 Order).

8. Plaintiff-Appellee filed her Amended Complaint, but failed to allege any event which occurred within the Statute of Limitations. (Exhibit F, Amended Complaint).

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9. Plaintiff-Appellee admitted that the events that give rise to her sexual harassment, gender and age discrimination, retaliation and constructive discharge claims occurred *prior* to September 12, 1998. (Exhibit G, Plaintiff's Answer to Renewed Motion for Summary Disposition, ¶ 5).

10. Plaintiff-Appellee's claims for sexual harassment, gender and age discrimination, retaliation and constructive discharge are barred by the Statute of Limitations.

11. Constructive discharge is not recognized as a separate cause of action. Instead, it is merely a defense to an employer's allegation that an employee left employment voluntarily.

12. Plaintiff cannot show that a constructive discharge occurred.

13. The "employment actions" which form the basis for Plaintiff-Appellee's suit occurred no later than September 12, 1998, the last day she was in the workplace, and therefore fall outside the three year Statute of Limitations. Accordingly, summary disposition is warranted in this case because Plaintiff-Appellee failed to file her lawsuit within the three year Statute of Limitations.

14. The Trial Court granted summary disposition pursuant to MCR 2.116(C)(7) because Plaintiff-Appellee's claims are untimely. (Exhibit A, 8/26/02 Order).

15. On March 2, 2004, the Court of Appeals agreed with the Trial Court that Plaintiff-Appellee could not assert a constructive discharge claim and further noted that Plaintiff-Appellee was never discharged. Nevertheless, the Court of Appeals reversed the Trial Court and found Plaintiff-Appellee's claims timely under Collins v Comerica Bank, 468 Mich 628; 644 NW2d 713 (2003), on the basis that Plaintiff-Appellee was still employed by

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Defendant-Appellant during the Statute of Limitations, although she was not in the workplace. (Exhibit B, 3/2/04 Order).

16. Defendant-Appellant filed a Motion for Reconsideration with the Court of Appeals pointing out that Collins was not germane to the issue of whether Plaintiff-Appellee's claims are timely because, unlike Collins, this is not a discharge case. The Court of Appeals summarily denied Defendant-Appellant's Motion on April 19, 2004. (Exhibit C, 4/19/04 Order).

17. The Court of Appeals erroneously relied on Collins to reverse summary disposition based on the Statute of Limitations. Plaintiff-Appellee's last day in the workplace was September 12, 1998. Plaintiff-Appellee did not have any contact with the alleged harassers after that date and, by her own admission, her claims accrued prior to September 12, 1998. Thus, Plaintiff-Appellee's Complaint filed on February 1, 2002 was untimely.

18. Defendant-Appellant DaimlerChrysler Corporation requests immediate review of its Application since DaimlerChrysler will suffer substantial financial harm in having to defend this time-barred claim through trial. Further, immediate review would promote the cause of justice by relieving Defendant of the burden of defending Plaintiff's time-barred gender discrimination and harassment claims, and would also promote judicial economy by dismissing all of Plaintiff's claims rather than mandating that the time-barred claims proceed through the discovery process and trial.

19. All parties are being served with the Emergency Application for Leave to Appeal and Motion for Immediate Consideration on May 24, 2004 by Defendant-Appellant placing a copy in the U.S. Mail with appropriate postage.

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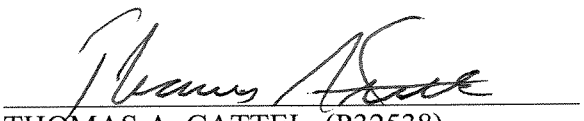
WHEREFORE, Defendant-Appellant DaimlerChrysler Corporation respectfully requests that this Honorable Court render an immediate decision on its Emergency Application for Leave to Appeal in order to avoid substantial economic harm to DaimlerChrysler Corporation in defending these time-barred claims.

CATTEL, TUYN & RUDZEWICZ, PLLC



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